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January XX, 2006

Hon. Kevin Martin, Chairman
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

RE: RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) OF 1991, 47 CFR PART 227, (DKT No 02-278).

Dear Chairman Martin:

On behalf of the 600,000 small-business owners represented by the National Federation of Independent Business (NFIB), I am writing to offer comments on the Federal Communications Commission's (FCC) Notice Requesting Comments on rules and regulations implementing the Telephone Consumer Protection Act (TCPA) of 1991, listed in the Federal Register on December 19, 2005 (70 Fed. Reg. 75102).

Background

NFIB and its members have had firsthand experience with the implementation of the regulations underlying TCPA. Our comments focus on the scope of the FCC's jurisdiction over interstate communications under the TCPA of 1991. NFIB believes that the FCC needs to affirm its exclusive authority to regulate interstate commercial fax messages and find that state laws that purport to regulate interstate fax communications are preempted by the federal TCPA, 47 U.S.C. 227.

We submit these comments both as a trade association representing its members, and as a regulated entity having to contend with the intricacies and consequences of the TCPA.

In 1991, in response to inconsistencies in commercial fax transmission and telemarketing regulation and because states lacked jurisdiction over interstate communications, Congress enacted the TCPA, 47 U.S.C. 227. This legislation was needed to create uniform regulations and standards for telemarketing and fax marketing. In 1992, the FCC adopted rules implementing the TCPA which set forth the “established business relationship” exception to the TCPA’s ban on unsolicited fax advertisement.

In 2003, the FCC reversed its prior conclusion that an established business relationship provides companies with the permission to send faxes to their customers and announced that a business could only advertise by fax with prior express written permission of the fax recipient. In response, Congress enacted the Junk Fax Prevention Act (JFPA) on July 9, 2005, which amended Section 227 to codify the FCC’s 1992 rule permitting businesses and other entities to send commercial faxes to recipients with which they have an established business relationship without the prior express consent. The JFPA also required that businesses include an opt-out provision in fax communications. Because Congress found that the FCC’s rule would have huge economic costs on businesses, in particular small businesses, it reinstated the established business relationship exception to permit legitimate business communications.

The California Statute

On October 7, 2005, California enacted a law that conflicts with the fax requirements of the TCPA by eliminating the established business relationship exception in the JFPA. The California law seeks to regulate commercial faxes sent

not only within California but between California and other states. NFIB urges the FCC to declare that the FCC has exclusive jurisdiction to regulate interstate commercial fax messages and all state efforts to do so are preempted.

The Conflict with Federal Law

The goals of adopting and implementing the TCPA and the JFPA were to create uniform standards for the regulation of interstate fax transmissions and to protect consumers' privacy while not impeding the activities of legitimate businesses and organizations. These efforts have been made irrelevant by the efforts of states to limit commercial fax communications. Congress did not intend to have businesses and associations work their way through and comply with the patchwork of inconsistent state fax laws.

Congress had no reason to address state authority because states lack jurisdiction to regulate interstate communication. The Constitution gives Congress explicit authority over matters of interstate commerce. Specifying the FCC's authority would have been redundant. The Communications Act of 1934 established that the FCC has exclusive jurisdiction over regulating all interstate and international communications. Exclusive federal regulation of interstate commercial fax transmissions is consistent with congressional intent, 47 U.S.C. 227(e)(1), and with prior FCC decisions. Individual states' attempts to regulate interstate communication have resulted in varying fax regulation that is not only inconsistent with Congressional intent and the goals of the TCPA, but extremely burdensome to the individuals, companies and other organizations that rely on fax technology to communicate with their customers and vendors. Consistent with its statutory and constitutional authority, the FCC should preempt all state laws purporting to regulate interstate fax transmissions and assert exclusive jurisdiction over such regulation.

Conflicting State Laws Burden Small Business and Undermine the TCPA

Complying with a variety of differing laws and regulations imposes a substantial burden on small businesses. Small businesses rely heavily on fax communication in their day-to-day operations, which are hampered by the inconsistent and burdensome requirements of the fax statutes of the various states. Businesses use a variety of faxes to communicate with their customers: Purchase orders, copies of orders, order confirmation, invoices, copies of invoices, drawings and artwork proofs, sales tax exemptions, among others. It would be difficult for a small-business owner to ensure that all faxes sent out are in compliance with the every state fax law and regulation. The amount of time and money spent researching and complying with the fax laws for 50 states would be great and would severely inhibit legitimate fax communications between businesses and their customers and between associations and their members. For a national association, such as NFIB, the labyrinth of state fax laws makes it difficult to conduct business without unintentionally violating some provision in the various state fax laws.

Unless the FCC affirms its exclusive authority the JFPA will not to protect small businesses from the cottage industry that has been created by the increased litigation that is taking place over faxing as some lawyers will take advantage of the inconsistency in the state's various requirements. Businesses trying to comply with state fax laws are already being hit with "shotgun" lawsuits; they are forced to settle or face exorbitant attorney's fees and litigation costs. See Exhibit A, "Get Paid for Faxes!", sent by an attorney soliciting potential do-not-fax lawsuits. Because of the variations among state law there has been an explosion of lawsuits. Many of these are unfounded and require businesses to defend themselves in distant locations or settle business claims to avoid the cost of litigation.

While the FCC is prevented from preempting state regulation for intrastate commercial fax communication, it has exclusive jurisdiction to regulate interstate

commercial fax communications and preempts all state efforts regarding interstate communications. Businesses need to be able to rely on federal law or regulations for guidance on how to construct a compliant fax messages sent to customers outside of their state.

NFIB appreciates the opportunity to comment on this issue. The clarification recommended can be beneficial to those small businesses and associations needlessly impacted by those consequences of individual state action.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Danner", with a long horizontal flourish extending to the right.

Dan Danner
Executive Vice President
Public Policy and Political